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Nos. 82-1585, 82-1586 and 82-1582

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ASSOCIATED MILK PRODUCERS, INC.,
Petitioner,
v.
THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

MID-AMERICA DAIRYMEN, INC.,
Petitioner,
v.
THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,
v.
THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPPOSITION BRIEF OF THE NATIONAL FARMERS' ORGANIZATION, INC.

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OPPOSITION BRIEF OF THE NATIONAL FARMERS' ORGANIZATION, INC.

Respondent The National Farmers' Organization, Inc. (NFO)[1] respectfully submits this brief in opposition to the Petitions for Writ of Certiorari filed by Associated Milk Producers, Inc. (AMPI), Mid-America Dairymen, Inc. (Mid-Am), and Central Milk Producers Cooperative (CMPC), to review the decision of the United

[1] NFO has no parent or subsidiaries and its affiliates were identified in its Petition for a Writ of Certiorari in Docket No. 82-1324.

States Circuit Court of Appeals for the Eighth Circuit finding that Petitioners illegally conspired to monopolize Grade A milk marketing and to eliminate competition in the marketing of such milk in violation of Sections 1 and 2 of the Sherman Act.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 687 F.2d 1173, appears in the Appendix of the Petition for Writ of Certiorari filed by The National Farmers' Organization, Inc., in Docket No. 82-1324, Appendix ("App.") at 1a. The opinion of the United States District Court for the Western District of Missouri, reported at 510 F. Supp. 381, appears at App. 67a. The Order of the Court of Appeals awarding costs and attorneys' fees on appeal is reported at 696 F.2d 1210 and appears in the Appendix to the Petition for Writ of Certiorari filed by the Central Milk Producers Cooperative in Docket No. 82-1582, Petitioner's Appendix ("P. App.") at 3a.

STATEMENT OF THE CASE

NFO seeks in this case nothing more than the freedom to sell milk unhindered by Petitioners' monopolistic harassment, and redress for the devastation Petitioners have inflicted and continue to inflict on NFO's marketing activities. After ten years of bitter litigation in the lower courts, and tens of millions of dollars in expenses, the Eighth Circuit Court of Appeals laid bare the ugly record of Petitioners' unrestrained predation and held NFO entitled to damages and injunctive relief.

While the details fill many file drawers in the record, the essential fact pattern in this case is not complex. Petitioners are the organizational products of a massive dairy merger wave in the late 1960's and 1970's. Independent milk sellers like NFO were viewed by Petitioners as a threat because they sold raw milk at lower prices, but paid their dairy farmer members competitive returns. (687 F.2d at 1194; App. 33a) Fearing com-

petition for members and customers, Petitioners coordinated a broad predatory campaign to destroy the ability of NFO and other independents to compete.

Initially, NFO's dairy program grew exponentially, but NFO quickly faced a mushrooming customer boycott all across the Midwest by dairies who had been harassed by Petitioners. Their tactics are classics in the history of antitrust litigation: supply cutoffs, short-shipping, discriminatory pricing, litigation, threats of litigation and below-cost predatory retail competition, among others. Petitioners succeeded. As a direct intended result, NFO lost substantial numbers of customers, potential customers and dairy farmer members. The Eighth Circuit held that Petitioners had engaged in a clearly unlawful predatory conspiracy in violation of §§ 1 and 2 of the Sherman Act, held that NFO had been injured in fact in a number of ways, and remanded for further proceedings as to the amount of NFO's damages and the scope of injunctive relief.

Petitioners now come to this Court seeking immunity based on at least seven different and often patently frivolous claims. Their arguments share two fatal flaws. First, Petitioners fail to cite a single decision, and there are none, exonerating the sort of predatory conduct they engaged in. Second, they studiously ignore or "revise" the facts of the case. This is not new. As the Court of Appeals commented, after detailing Petitioners' harassment of NFO customers from Minnesota to Texas: "Mid-Am and AMPI ignore most of the foregoing incidents in their argument on appeal." (687 F.2d at 1202; App. 49a) Nor is it surprising, since the facts unmistakably reveal a classic combination and conspiracy to eliminate competition, planned and executed at the highest levels of Petitioners' organizations.

The Eighth Circuit found that "the record reveals straightforward admissions of predatory motive by various AMPI officials and former officials." (687 F.2d at

1207; App. 60a) "Senior AMPI officials," found the Court, discussed sponsoring third-party suits against NFO in order to "break NFO's back" with litigation expenses. (687 F.2d at 1200; App. 45a).[2] One of these "senior" officials was AMPI's chief executive officer; another was AMPI's immediate past chief executive officer. AMPI's attempt to escape the facts, moreover, did not begin in the Court of Appeals. The Eighth Circuit found AMPI had intentionally suppressed and destroyed evidence during discovery:

> AMPI engaged in a deliberate pattern of shuffling and hiding documents—to warehouses, homes or other locations—specifically to avoid discovery.
>
> More serious is the stipulated fact that AMPI ordered the destruction of documents and that some were in fact destroyed. The district court characterized this conduct as involving "admitted bonfires." (687 F.2d at 1205; App. 55a-56a)

The Eighth Circuit found that Mid-Am's predation also originated at the top: "Mid-Am's practice of threatening or harassing buyers of NFO milk was planned as a strategy at Mid-Am board meetings." (687 F.2d at 1202; App. 49a) Similarly, CMPC, which also threatened litigation against NFO customers (687 F.2d at 1200; App. 46a), implemented with AMPI a scheme of anti-NFO predation in Chicago that was discussed at CMPC Board of Director meetings. (687 F.2d at 1197; App. 40a) The Court dismissed CMPC's convoluted defense of this conduct as "simply untenable" (687 F.2d at 1199; App. 43a), and concluded:

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[2] It is undisputed that such litigation was, in fact, filed less than six weeks after the "break NFO's back" meeting, and that plaintiffs were represented by AMPI's attorneys. The litigation was eventually voluntarily dismissed just prior to trial after eight years of burdensome motion and discovery practice. Since AMPI's attorneys were working on a contingent fee basis and there was no recovery, Plaintiffs in the sponsored litigation essentially were provided with AMPI's legal services for free. Petitioners' sham litigation against NFO is the subject of NFO's Certiorari Petition in No. 82-1324.

"CMPC's conduct itself . . . is the strongest evidence of an unlawful purpose . . . the conduct so established is predatory on its face." *Id.*

Petitioners' briefs to this Court gloss over the destruction of evidence and the raw predation and its planning and implementation by Petitioners' boards of directors and other high executives and attorneys. Instead, this Court has been presented with a sterilized, whitewashed version of the facts that ignores what this case was really about. NFO submits, however, that the crystal clear record of Petitioners' predation defeats their consistent efforts to wish it away.

REASONS THE WRITS SHOULD BE DENIED

I. The Eighth Circuit's Relevant Market Analysis Is In Harmony With Decisions Of Other Circuits And This Court And Raises No Important Issues For Review

CMPC, AMPI and Mid-Am press two grounds for review based on the Eighth Circuit's alleged failure to adequately define a relevant market: (1) they contend that without a relevant market, the § 1 Sherman Act judgment is faulty because their activities were subject to rule of reason analysis which always requires proof of relevant market; and, (2) by not requiring full-blown relevant market proof in a Sherman Act § 2 conspiracy case, the Eighth Circuit created a "dramatic conflict" (Mid-Am at 10) among the circuits. No review should be granted because: (1) defendants clearly engaged in *per se* illegal concerted predatory practices, eliminating any relevant market requirement under Sherman Act § 1; (2) no conflict among the circuits exists, since no court has ever required relevant market proof in a § 2 conspiracy case involving concerted predatory practices; and (3) no important antitrust questions are presented by § 2 conspiracy relevant market issues, since concerted predatory practices, like Petitioners', always, in any event, fully violate § 1.

A. Defendants Engaged In *Per Se* Illegal Concerted Predatory Practices

Defendants' activities were clearly *per se* illegal. The Eighth Circuit found that defendants engaged in a horizontal conspiracy using raw predation to eliminate NFO and other independent milk sellers in order to raise prices. No court has ever held such inherently anticompetitive practices subject to the rule of reason.

A few references to the Court of Appeals opinion place defendants' conduct, virtually ignored by defendants' briefs, into proper perspective:

> NFO was a specific target of the conspiracy. This conspiracy violates Sections 1 and 2 of the Sherman Act, notwithstanding the Capper-Volstead exemption, because it involved the concerted use of predatory and other unlawful anticompetitive means to eliminate competition and pursue monopoly power. (687 F.2d at 1191; App. 26a-27a.)
>
> [O]nly one conclusion . . . can be drawn. AMPI, Mid-Am and CMPC did conspire to monopolize and eliminate competition in the marketing of Grade A milk produced in the Midwest, through the use of discriminatory pricing, coercive supply disruptions and threats of similar conduct, as well as bad faith harassment and threats of litigation against independent buyers of NFO milk. (*Id.* at 1193; 31a-32a.)
>
> [This] conduct [in Chicago] . . . is plainly predatory. Simply put, CMPC and its agent AMPI sought to establish a premium for their milk . . . . Facing continuing rejection of a premium under these conditions [NFO competitive sales to Wanzer Dairy], AMPI and CMPC employed discriminatory pricing and coercive threats of supply cutoffs against Wanzer . . . . (*Id.* at 1198; 41a.)
>
> . . . In our view the conduct so established [in Chicago] is predatory on its face. (*Id.* at 1199; 43a.)

> [S]enior AMPI officials considered sponsorship of additional third-party litigation against NFO in the hope that the added cost of such litigation would "break NFO's back." (*Id.* at 1200; 45a.)
>
> Mid-Am, AMPI and CMPC . . . used the membership disputes with NFO as a pretext for threatening litigation against and otherwise harassing proprietary dairies which bought or considered buying NFO milk . . . . The findings and record evidence reveal . . . a broad pattern of litigation threats and harassment against buyers of NFO milk. (*Id.* at 1200; 46a.)
>
> Mid-Am's practice of threatening or harassing buyers of NFO milk was planned as a strategy at Mid-Am board meetings . . . . Mid-Am's subsequent conduct shows that the boardroom discussion was not merely idle talk. (*Id.* at 1202; 49a.)
>
> [T]he Foremost incident gives rise to only one conclusion: NFO was caught in a whipsaw created by the coercive conduct of AMPI and Mid-Am toward buyers of independent milk in general and NFO milk in particular. (*Id.* at 1204; 53a.)
>
> [T]he record reveals straightforward admissions of predatory motive by various AMPI officials and former officials. (*Id.* at 1207; 60a.)
>
> Here, the totality of the record leaves no doubt that Mid-Am, CMPC and AMPI conspired to gain control over and eliminate competition in the marketing of Grade A milk through the unlawful tactics noted above. (*Id.* at 1208; 61a.)

These concerted predatory practices, aimed at eliminating all competition, not just NFO, are classic *per se* Sherman Act violations straight from the pages of the unanimous Supreme Court decisions in *United States v. General Motors Corp.*, 384 U.S. 127, 145 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); and *United States v. Borden Co.*, 308 U.S. 188 (1939).[3]

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[3] Defendants apparently try to take comfort from the fact that the Court of Appeals refers repeatedly to defendants' activities as

The defendants' conduct, "predatory on its face," required no rigorous relevant market analysis to assess its competitive significance. It was inherently and intentionally destructive of competition.

B. No Appellate Court Has Ever Required The Rigorous Relevant Market Proof Petitioners Urge In A § 2 Conspiracy Case Involving Concerted Predatory Practices Intended To Destroy All Competitors

Trying to create a circuit conflict over § 2 conspiracy relevant market requirements, defendants ignore the facts in the cases. Every appellate decision cited by defendants as requiring rigorous relevant market proof involved ordinary rule of reason-type offenses that had ambiguous competitive significance unless analyzed in a structural setting.[4] On the other hand, rigorous relevant market

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"concerted predatory conduct" without affixing the Latin label *"per se."* However, as the court noted (687 F.2d at 1193 n.16; App. 30a n.16), "concerted predatory conduct . . . is 'unreasonable' under Section 1 regardless of whether the *per se* label is attached." It must be noted that in *Klor's, supra*, the classic group boycott case, this Court *treated* the boycott as *per se* illegal without ever actually using the talismanic phrase, *per se*.

[4] Defendants claim that § 2 conspiracy cases in the Third, Fourth, Fifth, Eleventh and D.C. Circuits require relevant market proof. The holdings in a number of these cases are ambiguous at best, reflecting a commentator's observation that "often . . . the [§ 2] conspiracy allegation appears to be no more than an afterthought . . . and it seldom gets the court's attention." 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 839 at 358 (1978). Nevertheless, each of these cases involved rule of reason-type offenses that would require relevant market proof even under § 1. Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 148 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982) (challenged exclusive dealing contracts were "examined under the rule of reason"); American Football League v. National Football League, 323 F.2d 124, 132 (4th Cir. 1963) (joint venture rule of reason analysis focusing extensively upon defendant's business justifications); Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1348 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) (business tort-type conduct explictly held subject to rule of reason); Bill Beasley Farms, Inc. v. Hubbard Farms, 695 F.2d 1341, 1343 (11th Cir. 1983) (vertical distribution rule of

proof has not been required in any case involving, as here, concerted predatory practices revealing on their face a specific intent to eliminate competition and control prices.

This consistent distinction between the cases is best expressed in *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926-27 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981):

> [N]o particular level of market power or 'dangerous probability of success' has to be alleged or proved in a conspiracy claim where the specific intent to monopolize is otherwise apparent from the character of the actions taken. [Citations omitted.] But where actions are ambiguous, the existence and extent of market power may make the inference of specific intent from conduct more or less plausible. [Citations omitted.]

See L. Sullivan, *Handbook of the Law of Antitrust* at 139-40 (1977); 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 839 at 358-59 (1978) ("where the agreements involved would also be held to offend § 1 without the necessity of proving power, the failure to require it for the § 2 conspiracy offense is understandable").

In *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961), as in other cases involving concerted predation,[5] relevant market was considered unnecessary because of the nature of defendants' practices:

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reason analysis); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957) (vertical distribution rule of reason analysis).

[5] *See, e.g.*, United States v. Yellow Cab Co., 332 U.S. 218, 226 (1946) (use of competition-stifling practices that "have been condemned time and again as violations of the [Sherman] Act"; held: no relevant market required); United States v. National City Lines, Inc., 186 F.2d 562 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951) (criminal conviction). *Accord*: United States v. du Pont & Co., 351 U.S. 377, 395 n.23 (1956). Defendants suggest that a later Second Circuit case conflicts with *Consolidated Laundries*, but this case simply illustrates the consistency in the case law, since it did not, like *Consolidated*, involve concerted predatory practices. *See* Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing, Inc., 510

> [T]he defendants took concerted action to drive independent non-cooperative linen suppliers out of business. In our opinion this was sufficient to support the conclusion that defendants had the specific intent to monopolize.

Here too, as in *Consolidated Laundries*, defendants' practices virtually on their face conclusively establish specific intent to monopolize. The Eighth Circuit repeatedly emphasized that defendants' predation was intended to eliminate not just NFO but, instead, *all* competing milk sellers, for the explicit purpose of raising prices. No appellate decision involving such clear malevolent intent, and concerted predation, has ever required formal relevant market proof in a § 2 conspiracy case. The Eighth Circuit's opinion creates no conflicts.[6]

F.2d 1140 (2d Cir. 1975). In *Hudson Valley*, the court found no *per se* offenses, and because of the ambiguous nature of defendants' practices, simply commented that structural evidence would have been helpful on "the question of whether . . . specific intent existed." *See also* Karlinsky v. New York Racing Assn., 517 F.2d 1010, 1011 (2d Cir. 1975), relied upon by defendants, which similarly does not conflict with *Consolidated*. *Karlinsky* involved no concerted predatory practices, but instead only vague allegations of ambiguous violations, which the Court dismissed as "frivolous."

[6] We would note, moreover, that in any event, the evidence of relevant market and defendants' power in this case more than satisfies any requirements for such evidence even in § 2 rule of reason cases. The Eighth Circuit clearly found raw Grade A milk to be the relevant product market and found the geographic aim of the conspiracy to be a "ten-state region" of the Midwest (687 F.2d at 1191, 1193; App. 27a, 30a). The ten states as revealed in the pleadings are: Wisconsin, Minnesota, Nebraska, Iowa, Illinois, Missouri, Kansas, Oklahoma, Arkansas, and Texas. This is the *same* relevant market alleged by *Mid-Am* in its original and five amended complaints against *NFO* (Ct. App. Record 2111-78, 2198-2360), thus constituting a conclusive judicial admission. McCormick, *Handbook of the Law of Evidence* § 265 (2d ed. 1972); 9 Wigmore, *Evidence* § 2589 (Chadbourn rev. 1981). Further, the Eighth Circuit said that defendants "do not deny having . . . significant market power" and that "we . . . are presented with the certainty, on this record, that AMPI, CMPC, and Mid-Am are the major marketers of raw milk produced in the Midwest . . . ." (687 F.2d

C. The § 2 Relevant Market Requirement Does Not Present An Important Antitrust Issue

As a further reason to deny review, a ruling upon the relevant market question raised by defendants would be largely unimportant both in this case and in antitrust law generally. As the Eighth Circuit noted, citing *Maryland & Virginia Milk Producers Association v. United States*, 362 U.S. 458, 463 (1960), the same predatory conspiracies may violate *both* § 1 and § 2 of the Sherman Act, and here, the Eighth Circuit in fact held defendants liable to NFO for violating both, through the same predatory conduct. The law has been absolutely clear for more than fifty years that concerted predatory practices, like those of defendants in this case, violate § 1 without necessity to prove relevant market. Thus, even if this Court were to reverse *Yellow Cab* and hold rigorous relevant market proof necessary for § 2 predatory conspiracies, defendants would *still* be fully liable to NFO under §1.

Areeda and Turner, who devote less than two pages of their five volume antitrust treatise to § 2 conspiracies, make the same point:

> Any arrangement that could be considered a combination or conspiracy to monopolize must necessarily also be an unreasonable restraint of trade offending § 1. To be sure, not all § 1 violations would constitute conspiracies to monopolize. But the key point is this: every combination or conspiracy that offends antitrust policy can easily be held to be an unreasonable restraint of trade, without the need for considering the additional complexities that flow from using the § 2 monopoly concept. *There is therefore no need whatever to try to define the content of the § 2 conspiracy.* [Emphasis added.]

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at 1192; App. 28a-29a.) The only unresolved question found by the Court was the precise level of defendants' market shares—a significant issue in § 2 actual and, perhaps, attempted monopolization cases, but irrelevant in § 2 conspiracy cases. In light of the defendants' own admissions as to market and market power, the vehemence of defendants' objections to the Eighth Circuit's opinion is ironic indeed.

3 P. Areeda & D. Turner, *Antitrust Law* ¶ 839 at 358 (1978). Thus, NFO submits that the § 2 conspiracy issue raised by defendants simply does not present a significant antitrust issue worthy of this Court's plenary consideration.

II. NFO, Injured As A Result of Being The Direct Target of An Unlawful Conspiracy Among Its Competitors, Properly Has Standing Under The Prior Decisions of This Court

The Petitioners' standing argument[7] is that they may lawfully drive a competitor—NFO—out of business by depriving NFO of customers and members. Two months ago this Court decided *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, —— U.S. —— 51 U.S.L.W. 4139 (February 22, 1983). That decision explicitly confirmed the standing of a competitor—such as NFO—to sue when its business is restrained by its competitors. Petitioners seek to avoid the impact of that decision by selectively lifting language from it, and asking this Court to speak again on the subject, only this time in a way more to Petitioners' liking. In fact, an analysis of Petitioners' arguments demonstrates that what they really seek is to have ninety-three years of antitrust precedents thrown into the refuse pile and to replace them with an "open season" doctrine which permits conspirators to prey on their competitors. The basic rationale of Petitioners' argument is that any harm NFO suffered as a result of their predation was "indirect and hence non-compensable." Petitioners also argue that they may lawfully eliminate NFO as a marketing organization competing for dairy farmer patronage since restraint of competition for such patronage does not involve a "product" and therefore cannot violate the antitrust laws. Finally, they argue that when they succeed in depriving NFO of revenue from members, these losses must all go uncompensated because they have done the

[7] CMPC Petition at 8-18.

public a favor by eliminating a group that intended to increase dairy farmers' income.

There has never been any question in this case that NFO competes with Petitioners for members and customers. NFO markets the milk of dairy farmers, and dairy farmers choose between NFO and Petitioners in deciding what organization they will join and market through. Milk handlers and processors, in turn, choose between NFO and Petitioners in deciding from whom they will purchase milk. Indeed this litigation originated from this very competition: Mid-America charged NFO with monopolizing the same business that Mid-America was in, by making Mid-America "lose customers to NFO" and by inducing farmers "to market milk through NFO."

The Eighth Circuit thus specifically found that NFO's and Petitioners' Milk marketing programs were in "*direct competition*" and that NFO, as a competitor, was a "*direct target of the unlawful conspiracy*" (687 F.2d at 1209; App. 63a) (emphasis added). These findings alone are sufficient to establish NFO's standing under the antitrust laws. *See* 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 340a (1978) ("Such standing is so clear that it is seldom challenged . . ."); *TV Signal Company of Aberdeen v. American Telephone & Telegraph*, 617 F.2d 1302, 1309 (8th Cir. 1980) ("Plaintiff has amply demonstrated standing since it was both a competitor and a potential competitor"). A holding that NFO does not have standing to complain when its competitors use unlawful means to drive off its customers and prevent it from attracting and retaining membes, would indeed make this case worthy of certiorari because this would be the most remarkable and radical change in antitrust doctrine since 1890.

Petitioners ignore this direct competition and boldly "invoke" *Associated General Contractors of California.* Although *Associated General Contractors* did not involve a complaint by an injured competitor, it does confirm NFO's standing. There, the plaintiff union complained

that the defendant contractors association had coerced landowners into boycotting union contractors and had coerced contractors into refusing to sign collective bargaining agreements with unions. This Court held that the union was not injured in its business or property within the meaning of the antitrust laws, but this Court's resolution of the injury and standing issues in *Associated General Contractors* confirms the correctness of the Eighth Circuit's decision—that NFO has standing here.

Most importantly, this Court stressed that "the Union was neither a consumer nor a *competitor*." 51 U.S.L.W. at 4145 (emphasis added). NFO is a competitor of the defendants. Because plaintiff in *Associated General* was neither a competitor nor a consumer the decision observed that it was not even clear whether the union's interests would be served or disserved by enhanced competition between contractors.[8] *Ibid.* A fortiori, there cannot be any question that NFO's interests were disserved—legally injured—by a reduction in competition when it was *NFO's* competition that was reduced.

This Court also stated that the union's injuries were only an indirect result of harm to competition in the contracting market. *Ibid.* The opinion goes on to point out that those contractors from whom business had been diverted—those whose position is identical to NFO's—*would* have been directly injured and would have had a right to maintain treble damage actions. A footnote to the Court's discussion reinforces this critical distinction:

> In contrast, the Union is neither a participant in the market for construction contracts or subcontracts nor a direct victim of the defendants' coercive practices.

Id. at n.44. NFO is a participant in the market Petitioners are in. NFO competes with them for milk sales

[8] Customers and competitors, as a matter of inexorable logic and by the clear implication of this opinion, are injured by a reduction of competition in the market they purchase or compete in.

and for members. *Associated General Contractors* may hold that the telephone company and the electric company cannot sue for reduced revenues when NFO's operations are stunted, but it does not hold that NFO is a sitting duck that Petitioners may freely remove from the competitive scene. It holds, indeed, quite the opposite—when Petitioners sought to weaken or destroy their competitor by driving away customers and members, NFO had a right to sue.

Petitioners also try to make NFO a sitting duck with some subsidiary "injury" arguments, none of which can withstand scrutiny. The first is that only competition in "milk" is protected under the antitrust laws, and that competition for the membership and patronage of farmers is not. CMPC Petition at 11-12. No authority is cited. There is none.

The second is that NFO's damages are "speculative" because NFO might have lost membership dues and marketing income for reasons unrelated to the antitrust violations, even though the Eighth Circuit held the violations to be a material cause of NFO's injuries. CMPC Petition at 10-12. Mid-Am and AMPI, of course, seek recovery for the *same* damage items in their suits against NFO. Moreover, Petitioners' argument was squarely rejected in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 at 114, n.9 (1969) holding that once the unlawful conduct is shown to be a material cause of injury, the victim ". . . need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury."[9]

Fittingly, Petitioners' "injury" argument closes with a claim that because NFO's aim was to obtain higher prices

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[9] Petitioners attempt to escape the effect of *Zenith* by citing Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Reliance on Illinois Brick is totally misplaced because it involved an intervening cause—a middleman's decision whether to pass on an overcharge—and not the question of whether other concurrent causes also contributed to a particular clearly demonstrable injury.

for farmers, Petitioners were acting procompetitively when they tried to wipe out NFO. CMPC Petition at 12-14. The antitrust laws do not permit private vigilantes to take the law into their own hands and destroy competitors on the pretext of "protecting competition." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), on which Petitioners base this wild argument, simply holds that a plaintiff cannot complain that he lost profits because there was too much competition. Petitioners "extrapolate" from this a license to decide what is best for the economy and to annihilate any competitors they disapprove of. This is utter nonsense.

III. This Case Does Not Present The Issue Of Whether A Conspiracy Can Be Premised Solely Upon Joint Exempt Conduct Since The Evidence Of Nonexempt Conspiratorial Conduct Is Abundant

According to Mid-Am[10] and AMPI,[11] the Eighth Circuit based its finding of a conspiracy *solely* upon activities that were antitrust-exempt under the *Noerr-Pennington* doctrince and Capper-Volstead Act. Petitioners have simply mischaracterized the Court's opinion and the record. In fact, the evidence of nonexempt conspiratorial activity was pervasive. The Court found that CMPC, Mid-Am and AMPI simultaneously engaged in a coordinated series of nonexempt predatory practices to destroy competitors, including NFO. These activities included coercing proprietary dairies to boycott NFO milk through supply cutoffs, short shipping, discriminatory pricing, bad faith litigation, and threats of litigation.

Petitioners do not, and cannot, contend that *any* of these practices are antitrust-immune, and the record overflows with evidence that they were the product of conspiracy. It is sufficient here, however, to emphasize that key parts of this predation were actually imple-

[10] Mid-Am Petition at 18-21.

[11] AMPI Petition at 17-24.

mented *jointly*, thereby conclusively establishing nonexempt concerted action. One key example is the Wanzer Dairy incident in Chicago discussed at 687 F.2d at 1197-99; App. 38a-44a of the Court of Appeals opinion. Through discriminatory pricing and threatened supply cutoffs, defendants blatantly coerced Wanzer Dairy into boycotting NFO. The Court ruled that "the conduct so established is predatory on its face." (687 F.2d at 1199; App. 43a.) AMPI was CMPC's Chicago marketing agent, and the Court found that AMPI and CMPC actively worked together to implement the predation. Thus, held the court, "both must be viewed as responsible for their joint role." (687 F.2d at 1197; App. 38a) AMPI, moreover, kept Mid-Am informed of this campaign against NFO in Chicago (687 F.2d at 1199 n.28; App. 42a n.28), and Mid-Am and AMPI worked together in the Southwest. For example, both Mid-Am and AMPI threatened Beatrice Dairy, Ft. Worth, with predatory reprisals for buying independent milk, even though Beatrice was only an *AMPI* customer, never a Mid-Am customer. As the Court found, after consulting with AMPI, Mid-Am brought sham litigation against Beatrice for the express purpose—and with the effect—of inducing Beatrice to boycott NFO milk. (687 F.2d at 1201, 1207; App. 47a, 60a.)

While the record contains an abundance of evidence of nonexempt activities from which a conspiracy could be inferred, these and other *joint* nonexempt actions establish concerted predatory conduct beyond any dispute. As the Court summarized, defendants' predation took place in the same time frame, they often acted jointly or for each others' mutual benefit, and the defendants left a "substantial paper trail" revealing their joint predatory plans and actions:

> [I]n approximately the same time frame [defendants engaged in] a series of acts . . . aimed at eliminating independent sales of milk in general and NFO in particular, including discriminatory pricing

and actual or threatened supply cutoffs, litigation and similar harassment. Some of Mid-Am's litigation threats were directed against buyers of NFO milk that had been AMPI customers, not Mid-Am customers. Mid-Am, in fact, gave AMPI advance notice of the suit it filed against NFO and Beatrice. AMPI and CMPC, of course, are inextricably bound together in the predatory actions undertaken in the Chicago market. The record also reveals that the defendants jointly discussed what they viewed as common "problems" posed by NFO.

Apart from the actual conduct of the defendants, the record reveals straightforward admissions of predatory motive by various AMPI officials and former officials . . . . Much of the record . . . consists of deposition testimony and over 5,000 documentary exhibits. Included is a substantial paper trail of meeting minutes and contemporaneous memoranda, from Mid-Am and AMPI meetings and from independent dealers, which tend to confirm the conspiratorial and predatory character of the conduct described here as unlawful. In short, the defendants' conduct on its face demonstrates concerted, unlawful tactics and such a conclusion is confirmed, not contradicted, by examination of the underlying record.[12] (687 F.2d at 1207; App. 60a.)

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[12] As an example of the underlying undisputed evidence of conspiracy, the record shows that on October 19, 1970, representatives of AMPI, Mid-Am, and CMPC met at the Bloomington, Minnesota Sheraton Inn "to discuss [their] similar experiences" concerning "NFO's marketing milk in their markets at cutrate prices." (Dist. Ct. Opinion at App. 270a-271a) That very same day CMPC and AMPI implemented the scheme of predatory price discrimination in Chicago. (*See id.* at 270a, and Ct. App. Opinion at 38a-44a) The predatory purpose of this scheme was discussed at meetings of Mid-Am Division Managers ("CMPC to raise handling chg . . . to Wanzer and any other customer they do not have full supply contract with—*aimed at NFO and Southland*") (NFO Exh. 91, emphasis added), and Board of Directors ("38¢ handling chg Wanzer/Southland . . . part supply—*may mean NFO milk not have a home*") (NFO exh. 1525, emphasis added). In response to this clear evidence of conspiracy, defendants failed to call as a witness at trial

Because the record is replete with "nonexempt" evidence of conspiracy and actual joint predatory conduct, the issue of whether a conspiracy finding can be premised solely upon evidence of exempt concerted activity is simply not presented by this case.[13]

IV. The Eighth Circuit Acted Well Within The Scope of Its Appellate Function In Reversing The District Court's Judgment

Petitioners' claim that the Court of Appeals "usurped" the trial court's fact-finding function [14] is as undeserving of this Court's attention as it is devoid of merit. First, they do not even pretend to satisfy any of the standards justifying review by this Court, nor could they. Secondly, an examination of what the Court of Appeals did reveals scrupulous adherence to the Rule 52(a) "clearly erroneous" principle as enunciated by this Court.[15]

The Court of Appeals did not conduct *de novo* factual

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any participant in the October 19 meeting. If this Court were to re-examine the Eighth Circuit's conspiracy conclusion, it would be compelled to retrace the "substantial paper trail" in the "underlying record."

[13] Mid-Am and AMPI hinge their whole argument on the erroneous contention that the *sole* evidence of conspiracy was exempt joint conduct. They do not—indeed, cannot—otherwise contend that the Court of Appeals misapplied this Court's prior decisions in ruling (App. at 35a-36a) that defendants' allegedly exempt joint conduct may be considered to show the "purpose or character" of other nonexempt activity. United Mine Workers v. Pennington, 381 U.S. 657, 671 n.3 (1965). Further, it must be noted that any fair review of the Court of Appeals opinion reveals that the allegedly exempt joint conduct comprised only a tiny portion of the total conduct at issue.

[14] AMPI Petition at 24-29.

[15] In United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) this court held that "a finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

review in reversing the lower court's decision.[16] Indeed, as the Court of Appeals expressly stated:

> The district court's affirmative factual findings and record evidence in support thereof . . . unmistakably show that AMPI, CMPC and Mid-Am illegally conspired to monopolize Grade A milk marketing and to eliminate competition in the marketing of such milk, and that NFO was a specific target of the conspiracy. (687 F.2d at 1191; App. 26a-27a.)[17]

The Court of Appeals thus strictly adhered to the "clearly erroneous" rule, basing most of its determinations on the trial court's findings and rejecting them only in those instances in which examination of the evidence as a whole, rather than as dismembered components, showed that a finding was wrong. (687 F.2d at 1207-08; App. 60a-61a). *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Continental Ore Co. v. Union Carbide and Carbon Co.*, 370 U.S. 690, 699 (1962). The degree of deference shown the trial court here is, in fact, remarkable, for the core of NFO's case consisted of documents, admissions and testimony from the participants in the conduct complained of, and none of these principals showed his face in court to have his demeanor and credibility evaluated.[18] *See United States v. General Motors*, 384 U.S. 127, 141-

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[16] The Eighth Circuit, clearly mindful of the proper role of a reviewing court, expressly stated that "In looking at the evidence underlying the findings, we do not contemplate a *de novo* review." (687 F.2d at 1199; App. 48a)

[17] The Eighth Circuit reiterated its reliance on the district court's affirmative findings of fact as it examined each element of NFO's conspiracy claim. *See, e.g.*, 687 F.2d at 1191; App. 27a (product market); 687 F.2d at 1193; App. 30a (relevant market); 687 F.2d at 1196; App. 38a-44a (predatory conduct); 687 F.2d at 1200; App. 46a (litigation threats and harassment).

[18] Petitioners' smokescreen, for example, about the trial judge's evaluation of the "conflicting testimony" on the Foremost incident, neglects to mention that not one whit of the story was disputed in open court. (Mr. Murphy never appeared at trial.)

146 n.16 (1966). Petitioners received the benefit of this deference when the Eighth Circuit refused to disturb the trial court's findings on market share (687 F.2d at 1191-92; App. 27a-29a), price-fixing with dealers (687 F.2d at 1199; App. 44a), mergers (687 F.2d at 1206; App. 58a-59a) and "pool-loading" (687 F.2d at 1206-1207; App. 59a) the latter in the face of a recognition of substantial evidence that it was unlawful. *Ibid.*

The short of it is that, if anything, the Court of Appeals went out of its way to give deference to the trial court's opaque "opinion" and Petitioners' complaints in this regard are spurious.

V. The Eighth Circuit's Attorney's Fee Decision Was Consistent With The Decisions Of Other Circuits

Petitioners contend that the Eighth Circuit created a circuit conflict by failing to reduce NFO's appellate attorneys' fee award to reflect relative success on appeal. (CMPC at 27-28.) Here, as elsewhere, Petitioners' factual premise is erroneous, since Petitioners simply ignored the Court's opinion. In fact, citing *"the outcome of the case"* as one of several key factors, the Court reduced NFO's lodestar fee request by approximately $100,000 and denied the requested multiplier (emphasis added). (696 F.2d at 1211; P. App. 5a.) Moreover, in rejecting the identical argument petitioners make here, the Eighth Circuit reiterated that "[W]e have considered the *ultimate outcome* of the appeal in our calculation of the lodestar figure and our refusal to enhance that figure by the suggested 1.5 multiplier." (Emphasis added.) *Id.* at 1212; 6a.

Similarly meritless is Petitioners' further contention that the Eighth Circuit's decision conflicts with decisions of other circuits, principally the Second Circuit. *See*: *Kane v. Martin Paint Stores, Inc.*, 439 F. Supp. 1054 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1368 (2d Cir. 1978) and *FLM Collision Parts, Inc. v. Ford Motor*

Co., 411 F. Supp. 627 (S.D.N.Y. 1976), *modified on other grds.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977). There is no conflict.[19]

While considering the ultimate outcome on appeal in awarding overall attorney fees, the Eighth Circuit declined to further specifically apportion the award for issues won and lost because the appellate issues were so "interrelated":

> "We do not reach that apportionment question here because the issues raised on the appeal are so interrelated that *we cannot say that any of the services compensated out of this fee award were not part of NFO's success on appeal.*" (696 F.2d at 1212; P. App. 6a) (emphasis supplied).

The *Kane* and *FLM* courts held that activities devoted *solely* to unsuccessful claims were not recoverable, but fully agreed with the Eighth Circuit that to the extent an attorney's work benefitted both successful and unsuccessful claims, that work was *fully compensable*. 439 F. Supp. at 1057; 411 F. Supp. at 633.[20]

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[19] This Court recently granted certiorari in Hensley v. Eckerhart, No. 81-1227 (8th Cir. Sept. 28, 1981) (unpublished), *cert. granted*, 50 U.S.L.W. 3695 (March 3, 1982) in order to address the question of apportionment in cases under 42 U.S.C. § 1988 for clearly segregable attorneys' fees solely attributable to pursuing unsuccessful issues. The result of this Court's decision in *Hensley*, however, will have no bearing on the instant case. Even if the rationale for apportioning fees under § 1988 were found applicable to the Clayton Act, both sides of the apportionment conflict agree that in cases such as this, where the Eighth Circuit found the successful and unsuccessful issues inextricably intertwined, the attorneys' efforts are fully compensable.

[20] The Fourth Circuit's decision in Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 70 (4th Cir. 1969), *cert. denied*, 429 U.S. 1097 (1977), which Petitioners also cite as conflicting with the Eighth Circuit's decision in this case, is clearly distinguishable on its facts. The Court of Appeals in *SCM Corp.* refused to overturn a district court decision which had reduced a fee request by apportioning the attorney's efforts between distinct successful and unsuccessful claims. As the Eighth Circuit expressly

Petitioners contend finally that this Court should grant plenary review of the Eighth Circuit's decision to compensate NFO for part of its reasonable appellate litigation expenses under Section 4 of the Clayton Act. Petitioners fail to mention that this case has now dragged on for more than eleven years, and cost the parties millions of dollars in attorneys' fees and related litigation expenses, and that their own conduct is a significant reason for these expenses and delay. The Eighth Circuit found that AMPI's deliberate document destruction and suppression "required extensive additional proceedings to ascertain the scope of suppression and . . . further review by NFO of virtually every aspect of AMPI's involvement in the case." (687 F.2d at 1205; App. 55a) The Eighth Circuit further found that Petitioners planned to "break NFO's back" with litigation expenses. (687 F.2d at 1200; App. 45a) Awarding NFO a portion of its expenses under § 4 of the Clayton Act was both completely reasonable under the extraordinary facts of this case and, in any event, not in conflict with the decisions of other circuits.[21]

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noted, however, the non segregable nature of the issues involved in this case prevented them from ever reaching a similar apportionment question. (696 F.2d at 121; P. App. 6a.)

[21] The Eighth Circuit found NFO equally and fully entitled to a portion of its reasonable expenses under both the "cost of suit" and "reasonable attorney's fee" provisions of § 4 of the Clayton Act. The purported contrary decisions cited by CMPC at 29 refer only to recovering expenses under the "cost of suit" provision. Thus, none of these decisions directly conflicts with the Eighth Circuit's holding that reasonable litigation expenses are recoverable as part of a "reasonable attorney's fee." Moreover, the Eighth Circuit's award of a portion of NFO's appellate litigation expenses, "whether considered part of the 'cost of suit' or part of a 'reasonable attorney's fee'" represents the only logical reading of the Clayton Act and is consonant with the congressional purpose of encouraging private plaintiffs to aid in enforcement of the antitrust laws. Furthermore, as Professor Moore has pointed out, "had Congress intended 'cost of suit' to include only taxable costs it would have said so." 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 54.71 [3] (2d ed. 1982). *Accord* Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d

VI. The Eighth Circuit's Application Of The Capper-Volstead Exemption Was Consistent With The Prior Decisions Of This Court

Petitioners AMPI and Mid-Am claim that NFO had nonfarmer members and that the Eighth Circuit's analysis of NFO's Capper-Volstead exemption conflicts with the decisions of this Court in *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967) and *National Broiler Marketing Association v. United States*, 436 U.S. 816 (1978). No review should be granted for three reasons.

First, contrary to Petitioners' claim, NFO has never conceded that it had *any* nonfarmer "members" and the Eighth Circuit did not so find. The Eighth Circuit simply referred to the alleged nonfarmers as "putative" nonfarmer members of NFO, but never definitely resolved this factual issue. The record in this regard consists *solely* of the stipulated contents of a handful of letters whose authors claimed to be nonfarmers in an effort to avoid paying dues. The letters, however, were rank hearsay when offered to *prove* the truth of their contents. There is no other evidence of nonfarmer membership in the relevant time period.

Second, in their claims against NFO, AMPI and Mid-Am solely seek damages resulting from the increased competition created by NFO's entry into milk marketing, and such claims are flatly barred by *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). The Eighth Circuit said "Although there is support in the record for [NFO's] theory, we need not reach the issue in light of our holding." (687 F.2d at 1188 n.9; App. 20a n.9)

If this Court were to consider reversing the Eighth Circuit's Capper-Volstead holding it would first be com-

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1087, 1100 (5th Cir. 1982); Pitchford Scientific Inst. Corp. v. Pepi, Inc., 440 F. Supp. 1175, 1178-79 (W.D. Pa. 1977), *aff'd*, 582 F.2d 1275 (3d Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

pelled to resolve each of the above two intensely factual issues that the Eighth Circuit never had to reach. Fact-finding, of course, is not this Court's province; moreover, if either issue were resolved in NFO's favor, Petitioners' whole Capper-Volstead argument would be moot. Thus, this matter is not appropriate for review.

Finally, on the merits, the Eighth Circuit's decision was fully consistent with prior decisions of this Court. The Capper-Volstead Act, 7 U.S.C. § 291, was intended to protect the right of farmers to collectively market their products. *See Case-Swayne*, *supra*, 389 U.S. at 391-393. Petitioners have fastened on some language in *National Broiler*, *supra*—a case in which farmers marketed collectively with non-farmers—and seek to extract from it a ruling that NFO's collective marketing activities were unlawful, even though no non-farmers were involved in any collective marketing.

Petitioners' argument, that receipt of twenty-five dollars in "dues" from a handful of individuals is the same as shielding middlemen from price fixing liability, completely ignores the relevant economic facts underlying this Court's prior Capper-Volstead decisions. For example, in *Case-Swayne*, this Court held that Sunkist was not a Capper-Volstead cooperative where its membership included nonproducers—"private corporations and partnerships, owning and operating packing houses for profit" (398 U.S. at 287)—and these private packing houses actively participated in Sunkist's control and policy making and directly enlarged Sunkist's market share.

In marked contrast to the nonproducers in *Case-Swayne*, the purported [22] nonfarmer members of NFO

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[22] As noted above, NFO has never conceded that it had any nonfarmer "members" and the Eighth Circuit did not so find. The Eighth Circuit noted that the "*putative*" nonfarmer members of NFO included: a car dealer, a truck driver, a fertilizer salesman, a school teacher, a retired farmer, a TV salesman and a telephone company employee. (687 F.2d at 1186; App. 17a.) The Court further observed that many of these alleged nonfarmers *never con-*

were never even alleged to have engaged in any collective marketing activities nor to have participated in NFO affairs. The most they could be said to have done was the contribution of dues. It is precisely that kind of nonproducer involvement which this Court found the Capper-Volstead Act contemplated:

> It was recognized, for example, that producers who desired to organize for collective marketing might not have, at the outset, the necessary finances to do so, and might therefore seek capital from nonproducers. (Legislative history citations omitted.)

(*Id.* at 395 n.13.)

In *National Broiler*, this Court denied Capper-Volstead status to the National Broiler Marketing Association because it had nonfarmers—large integrated agribusiness corporations—directly participating in the collective processing and marketing of broilers. The Court said that these firms were "indistinguishable" from the type of commercial packers and processors Congress did not want to protect, and held that such involvement by even one such nonfarmer entity would result in a loss of Capper-Volstead immunity. Just as in *Case-Swayne*, participation by commercial nonproducer entities in collective pricing and marketing activities destroyed any claim to a Capper-Volstead exemption.

In this case, however, the Eighth Circuit expressly found that "There is no suggestion here that dairy industry processors were members of NFO." (687 F.2d at 1186; App. 17a.) To the contrary, it is undisputed that all persons participating in the collective pricing and marketing of NFO milk were dairy farmers. (*Id.* at 1185; 15a.) Indeed, NFO's bylaws prohibited any non-

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sidered themselves NFO members and that "When they received dues' billings, they typically wrote of having made 'donations' to 'help get things started' and of not wanting to continue doing so." *Id.*

farmer from asserting any membership interest.[23] The record evidence shows that the alleged NFO nonfarmer members did not vote in NFO elections, did not attend NFO meetings or conventions and were not involved in any phase of the milk business; they were thus "members" in name only, functioning at most simply as capital contributors, a nonfarmer role explicitly approved in *Case-Swayne*.

This Court's decisions in *Case-Swayne*, *supra*, and *National Broiler*, *supra*, do establish that nonfarmers are not permitted to drag their activities under the tent of the Capper-Volstead exemption. These cases do not, however, establish a mechanistic "nonfarmer" rule to be applied without regard to the economic facts of the case, nor do they hold that a validly formed and operated cooperative loses its exemption, when it inadvertently attempts to collect dues from a fertilizer salesman or a schoolteacher. The rule urged by Petitioners seems to be that Capper-Volstead qualification should depend not on whether those acting collectively are farmers, but rather on the number and enthusiasm of clerical personnel employed by the cooperative. If this were the law it is doubtful that any large farmer group in the United States could qualify for Capper-Volstead status. Moreover, as the Eighth Circuit recognized "it would be cruelly ironic to exempt large Co-ops like Mid-Am and AMPI—professionally managed and operated by many nonfarmers—while denying exemption to the farmers who banded together in NFO." (687 F.2d at 1187; App. 28a.)

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[23] The Eighth Circuit stated "Moreover, NFO complied with the requirement that nonfarmers be excluded from membership by adopting bylaws in 1970 which make clear that any member who quits farming 'shall automatically cease to be a member and his or her membership agreement shall become null and void'." (Footnote omitted.) (687 F.2d at 1185; App. 15a.)

CONCLUSION

For all of the above reasons, AMPI's, Mid-Am's and CMPC's Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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